

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CS Docket No. 97-141

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COMMENTS OF
CABLEVISION SYSTEMS CORPORATION

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TABLE OF CONTENTS

I.	THE FCC SHOULD AMEND ITS OVS CERTIFICATION PROCESS TO ACHIEVE THE GOALS OF THE 1996 ACT	3
II.	THE FCC SHOULD INVESTIGATE THE OPEN VIDEO SYSTEMS IT HAS CERTIFIED OVER THE PAST YEAR TO ENSURE THAT THEY ARE TRULY "OPEN" AND NON-DISCRIMINATORY	6
A.	The FCC Should Bar OVS Operators From Using OVS As A Temporary Vehicle To Enter A Market Without Committing To A Long-Term Open Platform.....	7
B.	The FCC Should Investigate OVS Failures To Provide Adequate Information To Assist Program Providers On Their Platform.....	8
C.	The FCC Must Monitor OVS Build-Out Commitments	9
	CONCLUSION	10

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**COMMENTS OF
CABLEVISION SYSTEMS CORPORATION**

Cablevision Systems Corporation ("Cablevision") submits these comments in the Notice of Inquiry in the above captioned proceeding^{1/} to respond to the FCC's request for information on the new open video system ("OVS") mechanism established by the Telecommunications Act of 1996 (the "1996 Act") and the Commission's rules.^{2/} Cablevision is a producer and packager of video programming that is in the business of developing and marketing a diverse array of video programming services in competition with a number of other video delivery services, including OVS, that are the subject of this Notice of Inquiry.

Cablevision recognizes that the FCC's past three annual reports have principally focused on numerical evidence of cable's market share vis-à-vis other competitors. We believe that it is time for the FCC to step back and focus on more general issues affecting competition that go

^{1/} Notice of Inquiry, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 97-141 (rel. June 6, 1997).

^{2/} Id at ¶20. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). See also In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-249, Second Report and Order (rel. June 3, 1996) ("Second Report and Order"); In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, FCC 96-334, Third Report and Order and Second Order on Reconsideration (rel. Aug. 8, 1996) ("Third Report and Order").

beyond the simple yardstick of market share calculations. It is equally, if not more, important for the FCC to:

- insure that new entrants provide meaningful and sustained competition;
- serve as an active referee to insure that competition is open and fair; and
- make certain that what is happening in the marketplace is consistent with what Congress set out to achieve.

Cablevision submits that the experience with open video systems during the past year is a failure from each of these perspectives.

The 1996 Act, its legislative history, and the Commission's rules and regulations for OVS established a framework for open video systems that was designed to promote an alternative means to distribute video programming to consumers for the express purpose of advancing competition among facilities-based service providers in a nondiscriminatory manner.^{3/} The FCC's Cable Services Bureau was entrusted by the FCC with the task of ensuring that the OVS certification process "provide purposeful representations regarding the responsibilities of the open video system operator" in a manner that furthers the goals and objectives of Congress in the 1996 Act and the Commission's regulations.^{4/}

As implemented over the past year, however, the OVS process now serves to invite abuses and fails to provide meaningful information to either the FCC or interested parties about potential OVS operators' plans. OVS applicants to date have made a mockery of the good intentions of both Congress and the FCC. OVS systems are not, in fact, "open." In order to

^{3/} See H.R. Rep. No. 458, 104th Cong., 2d Sess. 1, 172, 176); Second Report and Order at ¶¶ 18, 22, 52-53.

^{4/} See Second Report and Order at ¶ 31.

ensure that the OVS framework becomes truly open and non-discriminatory, as originally contemplated, the FCC needs to amend its OVS certification process. The Commission also needs to investigate currently certified open video systems. In cases of blatant disregard of FCC rules, some of which are discussed in these comments, the Commission should revoke existing OVS certifications.

I. THE FCC SHOULD AMEND ITS OVS CERTIFICATION PROCESS TO ACHIEVE THE GOALS OF THE 1996 ACT

The Cable Service Bureau's blanket certification of OVS applications has so far sent a message to prospective applicants that even the most scant information, and the most blatant disregard of the law and the Commission's regulatory processes, will not bar the grant of OVS certifications. To date, the OVS certification process has attracted -- and the FCC has approved as OVS operators -- a company that has no known employees, capital, or revenues, and that is apparently unable to provide facilities-based OVS,^{5/} companies that were engaged in the unlawful provision of cable television services,^{6/} and a company that previously provided video programming without a lawful cable franchise, illegally excavated city streets, and illegally affixed materials and equipment to city property in a manner that threatened the public safety.^{7/}

^{5/} See In the Matter of Digital Broadcasting OVS ("DBOVS") Certification to Operate an Open Video System, DA96-1703, Order (Oct. 10, 1996); see Opposition of the California Cable Television Association (filed Oct. 7, 1996).

^{6/} See, e.g., In the Matter of Metropolitan Fiber Systems/McCourt, Inc., FCC Form 1275 Certification for Open Video System, DA96-2002, Opposition of Cablevision of Boston, Inc. at 3-10 (filed December 4, 1996); see also, Petition for and Expedited Determination Regarding Authorization to Obtain Capacity on the Open Video System of RCN-BETG, LLC Serving 48 Communities in Massachusetts, DA 97-1051, Cablevision of Boston, Inc. Reply at 9-10 (filed June 19, 1997).

^{7/} See In the Matter of Urban Communications Transport Corporation, Application for Open Video System Certification in the City of New York, New York and Westchester County, New York, DA 96-2190, -2191, Order (rel. Jan. 27, 1997); see Opposition of Cablevision at 5-6 (filed Dec. 30, 1996).

These applications for OVS certification underscore the need for the Commission to amend its OVS rules to require and strictly enforce letter-perfect certification filings containing sufficient information to allow the FCC to conclude that the grant of the OVS certification would be in the public interest, as well as the need for an orderly and logical application filing process. If the public and the FCC are to have sufficient information to ensure that applicants comply with the FCC's OVS regulations, the Commission must admonish applicants that do not fully set forth their proposals regarding OVS and their requisite qualifications to provide OVS service, and must adopt policies for future applicants that elicit the necessary information from the outset.

While these proposals have been made before by the cable industry,^{8/} the FCC at the time they were previously considered did not have before it the real world experience it now has after almost a year of operation under its current OVS rules. The FCC should therefore now clarify that OVS applicants must provide particular and precise information, including information regarding: (1) their corporate structure and a statement of financing and sources of funds that attests to their financial capabilities; (2) a statement of technical qualifications and network capabilities; (3) their intention to provide affiliated and nonaffiliated OVS programming; (4) their compliance with existing legal obligations; and (5) any local fees, local approvals, and communications with local communities.

While OVS applicants have ambitiously proclaimed that they intend to operate open video systems that are capable of transmitting hundreds of channels of video programming, the reality is that existing OVS operators have exhibited neither the intent nor the technical,

^{8/} See, e.g., Joint Comments of Cablevision Systems Corporation and the California Cable Television Association, CS Docket No. 96-46 at 3-4 (April 1, 1996); Petition for Reconsideration of the National Cable Television Association, CS Docket No. 96-46 at 5 (July 2, 1996) (the Second Report and Order's

financial, or operational capabilities to construct a facilities-based open video system platform capable of handling the channel capacity that they originally represented to the FCC. For example, while the RCN-BETG venture in Massachusetts has certified that it would operate an OVS platform with 330 channels of capacity, it appears that the RCN-BETG system is only capable of delivering 110 channels of capacity.^{9/} DBOVS, a certified California OVS operator, has yet to demonstrate that it is capable of delivering any channel capacity despite its representation that it would offer 500 channels of video programming throughout 106 communities in California.^{10/}

OVS applicants should also document, as an integral part of their application, their capability and intention to serve the entire area for which certification is requested. Otherwise OVS operators will be free to cherry-pick isolated buildings or limited communities within their self-defined service areas, contrary to the intention of the FCC that entire communities gain access to robust competition.

The FCC must specifically require OVS applicants to provide such information in order to prevent further rubber-stamped "certifications" to applicants who either lack the ability and intent to provide OVS service or applicants that intend to use the OVS process as a regulatory stalking horse to operate under reduced local and federal oversight until they can provide video service through other means.

"streamlined" process transforms regulation into self-policing and is dangerously close to an abdication of the FCC's responsibility to protect the public interest).

^{9/} Compare RCN-BETG, Massachusetts Cable Commission CATV Form 100, Exhibit J (as filed on May 30, 1997 with the City of Somerville) (RCN-BETG's "system will have an analog passband of 750 MHz with an analog channel capacity of 110 channels") with RCN-BETG FCC OVS Application, Section D (330 channels) (filed Feb. 17, 1997).

^{10/} See DBOVS FCC Application, Section D (filed September 28, 1996).

II. THE FCC SHOULD INVESTIGATE THE OPEN VIDEO SYSTEMS IT HAS CERTIFIED OVER THE PAST YEAR TO ENSURE THAT THEY ARE TRULY “OPEN” AND NON-DISCRIMINATORY

In order to obtain certification to provide OVS service, OVS applicants must certify that they will comply with the FCC’s rules for OVS providers.^{11/} The most fundamental of the Commission’s rules is that an operator of an OVS system shall not discriminate among video programming providers on its open video system.^{12/} The 1996 Act and the FCC rules require OVS operators to provide a platform that treats video programmers in an equitable and non-discriminatory manner.^{13/} Just as video dialtone providers were required to comply with certain common carrier-like requirements, so too are OVS system operators obligated to provide non-discriminatory carriage to video programmers.^{14/} The 1996 Act and the FCC’s OVS rules were expressly designed to allow both affiliated and unaffiliated programmers to gain access to an OVS platform to provide video programming competition.

Cablevision of Boston, Inc.’s experience with RCN-BETG demonstrates that OVS operators have manipulated and ignored the Commission’s OVS rules in order to evade their obligations to provide a nondiscriminatory platform that is “open” to independent video programmers. Instead, certain OVS operators, such as RCN-BETG, have pursued a business and operational strategy designed to distribute and promote only its affiliate’s video programming

^{11/} See 47 C.F.R. § 76.1502.

^{12/} See 47 C.F.R. § 76.1503.

^{13/} See 47 U.S.C. § 573(b)(1) and 47 C.F.R. § 1503(a).

^{14/} See 47 C.F.R. § 76.1503(c). For example, OVS operators are required to make up to two thirds of their channel capacity available to unaffiliated programmers when demand exceeds activated channel capacity and must always allocate capacity through a “fair, open and nondiscriminatory process . . . [that] must be insulated from any bias of the open video system operator” See 47 U.S.C. § 573(b)(1)(B) and 47 C.F.R. § 1503(a)-(c).

over a network that is effectively closed to all independent video programmers.^{15/} Cablevision recommends that the FCC investigate thoroughly the operations of certain currently certified OVS operators, such as RCN-BETG, to ensure they comply fully with the 1996 Act and the Commission's rules that require them to provide an "open" and nondiscriminatory OVS platform as contemplated by law.

A. The FCC Should Bar OVS Operators From Using OVS As A Temporary Vehicle To Enter A Market Without Committing To A Long-Term Open Platform.

First, the FCC should investigate instances where OVS operators are intentionally using their OVS certificates as leverage to obtain cable franchises. For example, RCN-BETG has deterred independent video programming producers from signing up for its OVS offerings by purposefully negotiating short-term OVS agreements with local franchise authorities until a cable franchise can be secured. On June 2, 1997, for example, RCN-BETG signed a one-year "Interim" OVS agreement with the City of Boston.^{16/} Under the terms of the agreement, prospective independent video programmers have absolutely no information about, or control as to, how long RCN-BETG's OVS platform will remain in existence. RCN-BETG has, through this tactic, frustrated the efforts of every video programming provider who would otherwise seek to provide programming over the RCN-BETG system. Under these circumstances, no

^{15/} Cablevision of Boston, Inc.'s Reply to RCN-BETG's Opposition to its Petition for Expedited Determination Regarding Authorization to Obtain Capacity on the RCN-BETG OVS Platform, which is attached to these comments (without exhibits) provides a detailed discussion of RCN-BETG's discriminatory practices.

^{16/} See Interim Open Video Systems Agreement Between the City of Boston, Massachusetts and RCN-BETG, LLC, June 2, 1997 ("Interim Agreement"). The document states that it is intended only as an interim agreement and then indicates that the parties are working toward executing a cable television franchise. The one-year term can be automatically extended for two additional six month terms or terminated earlier if a cable franchise has been granted. Interim Agreement, Section 1.3.

prospective video programmer that hopes to compete is likely to request channel capacity on the RCN-BETG platform when this OVS system may cease to exist soon after its inception.

In signing such a short term agreement, RCN-BETG has unlawfully discriminated in favor of RCN-BETG's programming affiliate. It has provided its own affiliate with the assurance that its programming operations will continue indefinitely, as a franchised cable television system. Unaffiliated providers, however, will only have access to the system for a very short – and indeterminable -- period.

Neither Congress nor the FCC intended OVS to be a mere limited regulation placeholder while the operator seeks to leverage its position as a less burdened competitor into a favorable cable television franchise.^{17/} To do so would provide an inequitable and anticompetitive advantage to OVS providers over others who enter the video marketplace by initially obtaining a cable television franchise.

B. The FCC Should Investigate OVS Failures To Provide Adequate Information To Assist Program Providers On Their Platform

Second, the FCC should also investigate instances in which OVS operators have violated their duty to provide an "open" non-discriminatory platform by refusing to provide prospective video programmers with any information about their OVS offerings. The FCC should investigate instances in which RCN-BETG, for example, has categorically refused to provide any information about its OVS plans to Cablevision of Boston, Inc. or others that would allow them to evaluate the commercial feasibility of becoming video programming providers on RCN-BETG's Massachusetts system. While Cablevision of Boston has been categorically denied this

^{17/} See, e.g., 47 C.F.R. § 76.1503(c).(2)(ii) (requiring OVS operators to reallocate available capacity at least once every three years).

information based on RCN-BETG's assertion that it is "proprietary" and "competitively sensitive," Cablevision of Boston's request precisely tracked the information that an OVS operator is required to disclose under the FCC's rules.^{18/}

The Commission should make clear that OVS operators such as RCN-BETG are to be instructed in no uncertain terms that they must either comply with the Commission's information disclosure rules or face decertification as an OVS provider. Otherwise OVS operators will have no incentive to solicit actively users of their platform capacity.

C. The FCC Must Monitor OVS Build-Out Commitments

Finally, the FCC should investigate all currently certified open video systems to ensure that they are truly designed to provide open video service throughout the entire service area territory. In order to fulfill the OVS statutory nondiscrimination requirements, the FCC should require all OVS operators to demonstrate that they can, and will, serve the entire service area territory authorized by the Commission. Failure to do so will allow OVS operators to service only selected communities, multiple dwelling units, or individual subscribers that are most attractive to their own affiliated programmers.

RCN-BETG's strategy, for example, of providing video programming to selected multiple dwelling units throughout its 48-community Massachusetts OVS service area clearly discriminates against non-affiliated programmers or potential programmers that should have the opportunity to offer service to any potential subscriber in RCN-BETG's service area, not just the areas served by RCN, RCN-BETG's affiliated video programmer. It also discriminates against those competing video delivery services that have made universal service commitments through

^{18/} 47 C.F.R. § 76.1503(b).

their franchise obligations. The FCC should ensure that all OVS operators construct facilities capable of serving the entire OVS territory requested within a reasonable time frame.

CONCLUSION

In obtaining their OVS certifications, a number of OVS applicants have certified during the last year that they will act as an OVS operator as Congress and the FCC contemplated and provide channel capacity to unaffiliated video programmers in a non-discriminatory manner. To date, however, several of the OVS operators certified, notably RCN-BETG, have not abided by these rules.

If RCN-BETG, or any other OVS operator, is unwilling to commit for a substantial period of time and to operate a truly open platform for independent programming as contemplated by law, then it should be de-certified as an OVS provider. Only in this way will truly open and fair video competition emerge from the aspirations of the 1996 Act's OVS provisions.

Respectfully submitted

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EXHIBIT

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Petition for an Expedited Determination)
Regarding Authorization to Obtain)
Capacity on the Open Video System of)
RCN-BETG, LLC Serving 48)
Communities in Massachusetts)

DA 97-1051

**REPLY TO OPPOSITION TO PETITION
FOR EXPEDITED DETERMINATION**

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Dated: June 19, 1997

TABLE OF CONTENTS

	Page
INTRODUCTION AND SUMMARY	2
I. RCN MUST BE REQUIRED TO OFFER GENUINE OVS SERVICES TO UNAFFILIATED PROGRAMMERS	5
A. RCN-BETG Has Failed to Offer an Open Video System That Complies with FCC Rules.....	6
B. RCN-BETG's Regulatory Gamesmanship Discriminates Against Independent Video Programming Providers.....	10
C. RCN-BETG's Refusal to Provide Joint Petitioners with Any Information With Regard to Its OVS Offerings Violates FCC Rules, and Raises Serious Questions About RCN-BETG's OVS Plans.....	13
II. ALLOWING JOINT PETITIONERS TO PARTICIPATE AS A VIDEO PROGRAMMING PROVIDER ON RCN-BETG'S OPEN VIDEO SYSTEM IS IN THE PUBLIC INTEREST.....	15
CONCLUSION	17

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Petition for an Expedited Determination)	
Regarding Authorization to Obtain)	
Capacity on the Open Video System of)	DA 97-1051
RCN-BETG, LLC Serving 48)	
Communities in Massachusetts)	

**REPLY TO OPPOSITION TO PETITION
FOR EXPEDITED DETERMINATION**

Cablevision of Boston, Inc., A-R Cable Services, Inc., A-R Cable Partners, and Cablevision of Framingham, Inc. (collectively "Joint Petitioners"), affiliated entities of Cablevision Systems Corporation ("Cablevision"), hereby submit their Reply to the Opposition filed by RCN-BETG in the above captioned proceeding.

On May 15, 1997, the Joint Petitioners, pursuant to Section 76.1503(c)(2)(v)(B) of the Commission's rules, 47 C.F.R. § 76.1503(c)(2)(v)(B), petitioned the Commission for an expedited ruling that each and all of the Joint Petitioners are authorized to obtain all relevant information regarding the availability of programming capacity on RCN-BETG's Open Video System ("OVS") in Boston, Massachusetts and forty-seven surrounding suburban communities, and are entitled to become video program providers on the RCN-BETG platform.^{1/} As demonstrated in the original Petition, allowing Joint Petitioners to participate as video

^{1/} In the Matter of RCN-BETG, LLC Certificate to Operate an Open Video System, DA 97-454, Memorandum Opinion and Order at ¶ 11, rel. Feb. 27, 1997. In the alternative, Joint Petitioners requested an expedited waiver, pursuant to Part 1.3 of the Commission's rules, of 47 C.F.R. § 76.1503(c)(2)(v) in order to allow Joint Petitioners access on the RCN-BETG open video system as a video programming provider for good cause shown.

programming providers on RCN-BETG's OVS platform is in the public interest and will enhance video competition and consumer choice in the Massachusetts video marketplace.

INTRODUCTION AND SUMMARY

For several years, RCN and its affiliates have sought to offer video programming to subscribers in the Boston area. While robust video competition is the laudable goal of the Telecommunications Act of 1996^{2/} and the Commission's policies and rules,^{3/} the fact is that the manner in which RCN and its affiliates have sought to provide video services has done anything but promote fair and vibrant competition in Massachusetts. Indeed, the continued unlawful provision of video service will send precisely the wrong message to legitimate would-be video competitors.

Operating outside of any legitimate video services framework -- whether traditional cable television, video dialtone, or now, Open Video Systems -- RCN and its affiliates have consistently ignored the rules and parameters established by this Commission and state and local regulators for the lawful provision of video service to subscribers.⁴ Now, while holding themselves out to this Commission as OVS operators, RCN-BETG is continuing this pattern so that they can continue providing cable service without abiding by the obligations of cable operators. Denying Joint Petitioners -- the only unaffiliated video programmers who continue to express interest in the so-

^{2/} Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996).

^{3/} See Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46, FCC 96-249, rel. June 3, 1996, ¶ 2 ("Second Report and Order"); see also Third Report and Order and Second Order on Reconsideration, rel. Aug. 8, 1996.

⁴ In the Matter of Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc., Election of Open Video System Option and

called Open Video System of RCN-BETG – the opportunity to provide their unique programming to Massachusetts consumers would further deprive them of the benefits of genuine competitive diversity and would allow RCN to continue operating as a cable operator without abiding by the applicable regulatory framework.

Joint Petitioners have requested information from RCN-BETG that would allow them to evaluate the commercial feasibility of becoming video programming providers on RCN-BETG's OVS systems serving Massachusetts. They have been categorically denied this information based on RCN-BETG's assertion that it is "proprietary" and "competitively sensitive" information. Denial of this information blatantly violates Section 76.1503(b) of the Commission's Rules, which requires its disclosure. Moreover, by not providing this information, RCN-BETG is effectively denying carriage to the Joint Petitioners and entrenching itself as a de facto cable operator.

In its opposition, RCN-BETG attempts to clothe its outright refusal to provide the Joint Petitioners with any information about its plans to provide OVS service in the rhetoric of promoting "competition." Review of the record, however, reveals a far more plausible explanation. RCN-BETG in fact has no intention of providing OVS service as the Commission contemplates it, but instead is using its OVS certification as a regulatory stalking horse in its ongoing attempts to provide video service through other means. Despite the Commission's grant of its OVS authorization and RCN-BETG's representations to the FCC that it intends to provide OVS service, RCN-BETG has been pursuing -- and continues to pursue -- alternative methods of providing video service, including cable franchises and operation of an unfranchised cable system

in Boston.⁵ RCN-BETG's latest regulatory ruse follows RCN-BETG's consistent pattern of attempting to evade regulatory requirements to secure for itself the benefits of being a cable operator in Massachusetts and elsewhere with none of the obligations.

In obtaining its OVS certification, RCN-BETG certified that it would act as an OVS operator as Congress and the FCC contemplated and provide channel capacity to unaffiliated video programmers, including Joint Petitioners, in a non-discriminatory manner. If RCN-BETG is unwilling to operate an open platform for programming as contemplated by law, then it should be de-certified as an OVS provider. At a minimum, the FCC should investigate thoroughly the operations of RCN-BETG to ensure they comply fully with the law. If, on the other hand, RCN-BETG is permitted to operate an OVS system, the Commission should instruct RCN-BETG to provide the Joint Petitioners with the requested information so that they may pursue their plans to provide programming over RCN-BETG's OVS systems, and declare that Joint Petitioners have the right to do so.

There is nothing in RCN's opposition, or in the pleading of any commenter, which demonstrates that the Joint Petitioners' provision of programming on RCN-BETG's facility will "significantly impede" the development of facilities-based competition. In fact, as set forth in the Petition, the Joint Petitioners' participation as programmers on the RCN-BETG OVS system will provide subscribers to the OVS system more programming choices than are currently available or would be available to subscribers if Joint Petitioners are not programmers on RCN-BETG's

⁵ See "RCN Outlines Fiber Optic Plan," Boston Globe, April 9, 1997 at E1; "Wired for Showdown," Boston Globe, May 21, 1997 at D1, "Cable Competition," Boston Sunday Globe, May 25, 1997 at 29, all attached hereto as Exhibit 1.

facility.⁶ This conclusion is reinforced by the fact that RCN-BETG's minimal and truncated approach to development of an OVS system, even if it is not an outright sham, virtually guarantees that no other video programmers other than Joint Petitioners are likely to come forward to express an interest in offering programming. This is not how Congress or the FCC intended OVS systems to operate.

I. RCN MUST BE REQUIRED TO OFFER GENUINE OVS SERVICES TO UNAFFILIATED PROGRAMMERS

In order to obtain certification to provide OVS service, RCN-BETG certified to the FCC that it would comply with the FCC's rules for OVS providers.⁷ The most fundamental of the Commission's requirements is that an operator of an OVS system shall not discriminate among video programming providers on its open video system.⁸ The Conference Report on the Telecommunications Act of 1996 (the "1996 Act") makes clear that OVS is authorized as an alternative method for providing video service in order "to maximize consumer choice of services."⁹ Despite its representations to the Commission, the record reveals that RCN-BETG is not, and has no intention of, honoring its commitment to providing a genuinely "open" OVS system. Rather, RCN-BETG has simply used its OVS certification as a bargaining chip in its negotiations with franchising authorities, while its public efforts to develop an OVS system appear calculated only to discourage any use of its "systems" by third parties.

⁶ See Joint Petitioners' Petition at 10.

⁷ See 47 C.F.R. § 76.1502.

⁸ See 47 C.F.R. § 76.1503.

⁹ H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 172 (Jan. 31, 1996).

A. RCN-BETG Has Failed to Offer an Open Video System That Complies with FCC Rules

The 1996 Act and the FCC rules require RCN-BETG to provide an OVS platform that treats video programmers in an equitable and non-discriminatory manner.¹⁰ Just as video dialtone providers were required to comply with certain common carrier-like requirements, so too are OVS system operators obligated to provide carriage to video programmers in a non-discriminatory manner.¹¹ For example, OVS operators are required to make up to two thirds of their channel capacity available to unaffiliated programmers when demand exceeds activated channel capacity and must always allocate capacity through a “fair, open and nondiscriminatory process . . . [that] must be insulated from any bias of the open video system operator”¹² The record reveals that RCN-BETG has no intention of honoring these requirements. Instead, RCN-BETG’s public statements make clear that it is using its OVS certification as leverage to obtain cable franchises. RCN-BETG’s public statements further make clear that once it obtains a cable franchise, it will quickly abandon its OVS status. In fact, RCN-BETG has now indicated that it does indeed intend to seek a cable franchise within one year.¹³ In short, RCN-BETG’s approach has been carefully crafted to obtain maximum regulatory advantage, while at the same time discouraging third parties from investing in the provision of unaffiliated programming over RCN-BETG’s OVS system.

¹⁰ See 47 U.S.C. § 573(b)(1) and 47 C.F.R. § 1503(a).

¹¹ See 47 C.F.R. § 76.1503(c).

¹² See 47 U.S.C. § 573(b)(1)(B) and 47 C.F.R. § 76.1503(a)-(c).

¹³ “RCN’s Boston Deal Reveals OVS Pitfalls,” Multichannel News, June 9, 1997 at 1 and “Now For Your Viewing Pleasure,” Boston Sunday Herald, May 25, 1997.

RCN-BETG's public statements make clear that it has little interest in actually developing an OVS system. These statements belie the assertion in RCN-BETG's Opposition that, "Cablevision's prior actions and this latest Petition are forcing RCN to re-evaluate its entry into the open video system business."¹⁴ In fact, RCN-BETG had been discussing with Massachusetts communities for months its preference for obtaining cable television licenses rather than providing OVS service. As early as March 24, 1997, in a public hearing, RCN's representatives stated that they want to enter into negotiations for cable television licenses rather than provide video service under the Commission's OVS regime.¹⁵

On this occasion, on behalf of RCN-BETG, Mr. Scott Burnside stated that "we hope and we trust that the Town of Wakefield will be interested enough to pursue this expedited [cable] franchise process with us. Because, quite frankly, we'd rather have a franchise than some other alternatives that are possible, at least by virtue of the Telecommunications Act."¹⁶ Later in the same proceeding, Mr. Burnside stated that one of the possible ways of competing with a cable operator is through an open video system, a "concept that's been bandied around quite a bit and not too much is really understood about it."¹⁷ He goes on to outline RCN-BETG's strategy: "quite frankly, when we first began to look at the opportunities, we felt that we had to go through this open video system concept, because it would take probably eighteen months to two years to

¹⁴ See Opposition, note 4.

¹⁵ See Transcript of Public Hearing of Board of Selectmen, Town of Wakefield, Massachusetts, regarding RCN's Proposed Franchise Presentation on March 24, 1997 ("Transcript") at 16, lines 8-10. Transcript is attached hereto as Exhibit 2.

¹⁶ Transcript at 16, lines 5-11.

¹⁷ Transcript at 25, lines 1-3.

get a franchise in the Boston area.”¹⁸ However, to the extent RCN-BETG is able to quickly obtain a cable television franchise, that is its goal.¹⁹

Since that hearing, RCN-BETG has contacted numerous communities in Massachusetts. Two of these, Brookline and Somerville, have formally commenced the licensing process.²⁰ RCN-BETG’s preference to operate cable television systems rather than OVS systems has been articulated by RCN-BETG long before Joint Petitioners filed their Petition.²¹ Or, even more troublesome, RCN could use its extant OVS certification as leverage in negotiating and/or operating its cable systems, should they ever become lawfully franchised. It is specious of RCN-BETG to suggest otherwise, and is further evidence of their predilection for gaming the regulatory regimes created by Congress and implemented by the FCC.

¹⁸ Transcript at 25, lines 8-12.

¹⁹ Transcript at 25, lines 12-19. There is no policy reason to allow this flagrant abuse of the OVS regulations. Particularly in Massachusetts where the Massachusetts Commission recently amended its licensing regulations stating, in part, that these changes were to remove regulations that were “no longer . . . relevant and sensible as we move into a new telecommunications era we believe will be marked by competition.” (See In re: Amendment of 207 CMR 2.00 - 10.00, Report and Order, Docket No. R-25, rel. Dec. 27, 1996 at ¶ 7.) In addition, the Massachusetts Commission frequently waives its procedural regulations to expedite the licensing process. (See, e.g., letter from Massachusetts Commission to Peter J. Epstein, attorney for the Town of Brookline, dated May 19, 1997, in which the Massachusetts Commission reduces by one half the amount of time its regulations require for the license application solicitation period.)

²⁰ See letter from Peter J. Epstein on behalf of Mayor of Somerville to Massachusetts Cable Television Commission dated May 16, 1997; letter from Peter J. Epstein on behalf of the Town of Brookline to Massachusetts Cable Television Commission dated April 23, 1997 (both informing Massachusetts Commission of commencement of cable television licensing process); “Brookline Notes,” Boston Sunday Globe, April 13, 1997; Massachusetts Cable Commission form for Application for a Cable Television License (Form 100) for City of Somerville, Massachusetts, all attached hereto as Exhibit 3.

²¹ See Transcript at Exhibit 2 and articles at Exhibit 1.

RCN-BETG's latest attempts to leverage local franchising authorities with its OVS certification follows its long-standing practice of operating unauthorized and unlawful cable television systems in Massachusetts and elsewhere, and covering its tracks with regulatory shell games. In February 1996, RCN and another of its partners, MFS, were issued a Show Cause Order by the Massachusetts Cable Television Commission (the "Massachusetts Commission") finding that RCN/MFS is providing cable television service without a franchise. This proceeding has yet to be concluded because, despite a stated desire to be a cable operator,²² RCN and MFS sued the Massachusetts Commission in federal court to enjoin its proceeding.²³ RCN/MFS claimed in its lawsuit that it was already operating a video dialtone system and, therefore, it was not subject to the Massachusetts Commission's jurisdiction.²⁴ Despite a decision by the Cable Bureau that RCN/MFS was not operating a video dialtone system and, therefore, that it was unable to transition to an OVS system pursuant to FCC rules,²⁵ and a denial of a request for reconsideration of this decision by the full FCC,²⁶ RCN remains unwilling to submit to the

²² See Transcript at 16, lines 5-11.

²³ See Residential Communications Network of Massachusetts, Inc., and Metropolitan Fiber Systems/McCourt, Inc. v. Commonwealth of Massachusetts Cable Television Commission, and John D. Patrone, Commissioner, Docket No. 96-10881-RGS (D.Mass.) ("RCN v. Massachusetts Cable Commission").

²⁴ See RCN v. Massachusetts Cable Commission, Complaint at 3, attached hereto as Exhibit 4.

²⁵ See Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York, Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition and Metropolitan Fiber Systems/McCourt, Inc., Election of Open Video System Option and Motion for Extension of Time to Complete Open Video System Transition, Consolidated Order, DA 97-452, rel. Feb. 27, 1997, ¶ 35.

²⁶ See Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York and MFS/McCourt, Inc., Election of Open Video System Option and Motion for Extension of Time

Massachusetts Commission's jurisdiction. Most recently, on June 13, 1997, RCN and its affiliate filed an appeal of the FCC's determination that it was not operating a video dialtone system with the D.C. Circuit Court of Appeals.²⁷

RCN has continually asserted, without any legal basis, that it is operating a video dialtone system and it continues to do so. The latest appeal of this decision merely provides a further delaying tactic for RCN-BETG while it continues to negotiate a cable license with the City of Boston. In the meantime, RCN continues to provide programming to Boston subscribers over an unauthorized system. This behavior on the part of RCN-BETG is an outrageous flaunting of the rules and regulations promulgated to regulate video delivery services.

In short, RCN-BETG's alleged offering of an OVS platform is yet another attempt to enter the video marketplace in Massachusetts without regard to federal, state or local jurisdiction. The FCC should put a stop to RCN's gaming of the regulatory process. Unless RCN-BETG can demonstrate that it is complying with the applicable rules and regulations, the FCC should de-certify RCN-BETG as an OVS provider.

B. RCN-BETG's Regulatory Gamesmanship Discriminates Against Independent Video Programming Providers

Events since the Petition was filed make clear that RCN-BETG's openly ambivalent attitude toward its own OVS offerings is carefully crafted to deter independent video programming producers from signing up for its OVS offerings. On June 2, 1997, RCN-BETG

to Complete Open Video System Transition, Order on Reconsideration, FCC 97-169, rel. May 16, 1997.

²⁷ Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York and Metropolitan Fiber Systems/McCourt, Inc. v. Federal Communications Commission, Petition for Review and Notice of Appeal of an Order of the Federal Communications Commission, filed June 12, 1997 attached hereto as Exhibit 5.